

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of )
Request for Extension of Time to )
Construct Digital Facilities ) File No. BEPCDT-20020301AJW
WDKY-DT, Danville, Kentucky ) ID No. 64017

MEMORANDUM OPINION AND ORDER

Adopted: September 10, 2002

Released: September 16, 2002

By the Chief, Media Bureau:

1. The Media Bureau (the "Bureau") has before it a petition for reconsideration filed by WDKY Licensee, L.P. (WDKY) seeking reconsideration of the Bureau's letter of June 5, 2002, denying its request for an extension of time to construct the digital facilities for WDKY-DT and admonishing WDKY for failing to meet the May 1, 2002, construction deadline for DTV facilities. For the reasons stated below, we deny the petition.

2. In its petition, WDKY argues that the Bureau (1) misstated relevant facts and ignored the realities of DTV construction; (2) ignored WDKY's good faith efforts to meet the May 1, 2002, construction deadline; (3) failed to provide due process by not providing adequate notice of its intent to impose admonishments; and (4) failed to afford similarly situated parties similar treatment.

3. WDKY relies on essentially the same facts and arguments in support of its first two claimed grounds for reconsideration. WDKY claims that the Bureau misstated relevant facts when it concluded that WDKY had four years to make adequate arrangements to build its DTV facility. WDKY also claims that the Bureau erred in concluding that WDKY's representations that its facility would be operational "in the second quarter of 2003" had no reasonable basis. WDKY states that it was unreasonable for the Bureau to have expected completion of the station by the May 2002 deadline because the construction permit was not issued until September 2001 and the national DTV build out generated market constraints on the availability of engineers due to unusual demand. WDKY also provides a timeline setting out past and future construction steps in support of its position that it made extensive good faith efforts to meet the May 1, 2002, deadline. WDKY contends that its actions supported a reasonable expectation that its DTV facility would be operational "in the second quarter of 2003."

4. We find these arguments unpersuasive. To begin with, any delay in the approval of WDKY's DTV application arose from the proposals laid out in the application itself. DTV applications that were incomplete, that presented technical, legal, or financial questions, or that were mutually exclusive with other applications naturally took longer to resolve than applications that were grantable as filed.

Furthermore, WDKY reasonably should have anticipated that there would be heavy demand on engineers due to the nationwide DTV conversion and should have allowed for possible delays based on that workload. Therefore, WDKY's delays either arose from its own actions or from a situation which it easily could have foreseen. In addition, WDKY has had to file a modification application, on which it says its engineer did not begin work until June 2002, thereby delaying it in placing an order for its transmitter and antenna. This delay makes questionable WDKY's ability to commence operations as planned under its timeline. The Bureau's conclusion that WDKY had failed to justify its failure to meet the May 1, 2002, date and that WDKY's projection that its station would be operational by December 2002 had no reasonable basis were, therefore, well founded.

5. WDKY next argues that the Bureau failed to give sufficient notice that it would admonish parties who failed to meet the DTV construction deadline. Admonishment is not an unusual or excessively punitive remedy, but rather is a penalty regularly imposed in a variety of contexts for failure to abide by Commission requirements.<sup>1</sup> In this context, WDKY failed to comply with a Commission imposed build-out requirement. Its apparent expectation that it would be permitted to do so without ramifications was baseless and mistaken. As a result, WDKY's contention that it was denied "due process" when it received an admonishment for failure to comply with the build-out requirement is without merit. WDKY should note, however, that if it continues to miss deadlines imposed by the Commission on its DTV build out, it will be subject to additional sanctions.

6. Finally, WDKY argues that similarly situated parties were not given similar treatment. Apparently, WDKY contends that it was treated unfairly because its DTV application was approved later than the applications of other parties. As noted above, any delay in processing WDKY's application resulted from the terms of WDKY's proposal, not from any disparate treatment of WDKY. We, therefore, reject WDKY's contention that it was treated differently than similarly situated parties.

7. ACCORDINGLY, IT IS ORDERED, THAT the petition for reconsideration filed by WDKY Licensee, L.P. seeking reconsideration of the Bureau's letter of June 5, 2002, which denied WDKY's request for an extension of time to construct the digital facilities for WDKY-DT and admonished WDKY for failure to meet the May 1, 2002, construction deadline for digital television facilities, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

W. Kenneth Ferree  
Chief, Media Bureau

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<sup>1</sup> See, e.g., *Davidson County Broadcasting*, 12 FCC Rcd 3375 (1997)(failure to comply with EEO rules); *Rainbow Broadcasting*, 14 FCC Rcd 11099 (1999)(failure to obtain Commission consent prior to replacing authorized antenna); *Black Media Broadcasting*, 16 FCC Rcd 3374 (2001)(broadcast of commercials on noncommercial station).